

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SANDRA M. BARNES	:	DETERMINATION
	:	DTA NO. 816328
for Redetermination of a Deficiency or for Refund of New	:	
York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1986.	:	

Petitioner, Sandra M. Barnes, 54 West 91st Street, Suite 2, New York, New York 10024-1417, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1986.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York 10022, on October 5, 1998 at 3:00 P.M., with all briefs to be submitted by March 5, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that petitioner failed to pay all of her income taxes due for 1986, such that the deficiency asserted against her should be sustained.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued a notice concerning Assessment L-000032129-2 to Sandra M. Barnes (“petitioner”) claiming 1986 personal income tax due of \$439.00. The original bill was dated March 31, 1988. Pursuant to the assessments receivable history on this assessment, the current balance due on Assessment No. 000032129-2 was \$1,196.45 as of October 2, 1998, consisting of tax in the amount of \$439.00, penalty and interest in the amounts of \$209.50 and \$773.89, respectively, less payments and credits in the amount of \$225.94. The assessment history report also indicates the return was filed late and only partially paid. Other documents submitted by the Division indicate the tax balance due on petitioner’s 1986 personal income tax return was \$516.00, against which \$77.00 of prepayments in the form of withholding were applied.¹

Although tax due was also asserted for 1985, such assessment has been paid in full and is no longer in issue.

2. The Division introduced into evidence two items of correspondence, dated September 23, 1994 and April 4, 1996, respectively, responding to petitioner’s inquiries about the assessment issued for tax year 1986, and the application of refunds from subsequent tax years applied to the outstanding 1986 balance due.

3. Petitioner was unable to provide a copy of her 1986 personal income tax return. The Division, however, supplied a Taxpayer Material Outcharge Ticket which set forth the tax return’s numerical data. The Division’s answer indicates that petitioner filed her 1986 personal income tax return on February 9, 1988. The information provided by these documents has not

¹The Division did not produce an assessment document. Since the tax was self-assessed when the return was filed, presumably the notice issued was a notice and demand rather than a notice of deficiency, which would not be used in such a situation.

been refuted by petitioner.

4. Petitioner maintains that her employer during 1986 withheld more tax than reported on her W-2 (which information was reflected on the Division's outcharge ticket), and sought to obtain information to prove the same.

5. A subpoena was issued to Henri Bendel, petitioner's former employer to compel the production of W-4 and W-2 information for petitioner for 1986. The following response dated November 5, 1998, was received from the company's human resources coordinator:

This letter is to document our telephone conversation regarding Sandra Barnes. Unfortunately, we do not keep employee records and tax information for more than a ten year period. Although I do not have any records here at Henri Bendel, Inc., I also had someone search our storage area in Columbus, Ohio. Our employee records were dated as far back as 1988. I took the search further by calling our payroll administrator, ADP, to track down any information. The search was unsuccessful.

6. Petitioner's additional attempt to locate pay stubs from 1986 proved unsuccessful.

7. A conciliation conference was scheduled before the Bureau of Conciliation and Mediation Services on October 23, 1997 concerning Notice No. L000032129 for tax year 1986. Petitioner failed to appear personally or by representative, and a Conciliation Default Order was issued dated November 7, 1997. A timely petition was received by the Division of Tax Appeals on February 5, 1998.

8. The Division assessed penalties pursuant to Tax Law § 685(a)(1) and (2) for failure to timely file her 1986 income tax return and for failure to pay the amount shown on the return, respectively.

CONCLUSIONS OF LAW

A. Tax Law § 682 provides that the amount of tax which a return shows to be due is deemed to be assessed on the date of filing of the return. The party challenging the assessment

bears the burden of establishing by clear and convincing evidence that the tax assessment is in error. In short, an assessment is presumed correct unless petitioner proves otherwise by the introduction of sufficient evidence (*see, Bello v. Tax Appeals Tribunal*, 213 AD2d 754, 623 NYS2d 363).

B. Petitioner's tax was self-assessed upon the filing of her tax return in February 1988. It showed a total tax balance of \$539.00, and prepayments in the nature of withholding in the amount of \$77.00. For petitioner to prove that additional tax was withheld, something other than her assertion that her former employer reported in error is needed. In this case, petitioner failed to produce the income tax return in question, a W-4 filed with the employer for 1986, her 1986 W-2 or pay stubs which may have supported her position. Petitioner's mere assertion that there was additional withholding by her employer for which she has not been given credit is insufficient absent additional proof. Thus, the assessment must be presumed correct.

C. A taxpayer is faced with the task of establishing that there was reasonable cause for her failure to file timely and pay the tax due, so as to justify the abatement of penalties (Tax Law § 685(a)(1), (2); *see, Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). Petitioner has not provided any basis for abating penalties. Furthermore, her assertion that her employer withheld more income tax than appears in the Division's records, without substantive proof, does not provide a reason to abate penalties.

D. The petition of Sandra M. Barnes is hereby denied, and the assessment, as adjusted by payments applied, is sustained (*see*, Finding of Fact “1”).

DATED: Troy, New York
August 19, 1999

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE